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COURT OF CRIMINAL APPEALS
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NO. PD-0478-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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ROBERT F. HALLMAN,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

From the Court of Appeals for the Second District of Texas
02-18-00434-CR

Appeal in Cause No. 1548964R in Criminal District Court No. 1 of Tarrant County, Texas, the Hon. Sheila Wynn presiding over voir dire; the Hon. Keith Dean presiding over guilt/innocence; the Hon. Elizabeth Beach presiding over pretrial and punishment

STATE'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 70.3 and 38.1(a), the following is a complete list of all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel:

1. The parties to the trial court's judgment are the State of Texas and Robert F. Hallman, the Appellant.

2. Leticia Martinez, attorney of record for the Appellant at trial, 420 Throckmorton, Suite 200, Fort Worth, Texas 76102.

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4. Lisa Mullen, attorney of record for the Appellant on appeal, 3149 Lackland Road, Suite 102, Fort Worth, Texas 76116.

5. Sharen Wilson, Criminal District Attorney, attorney for the State of Texas, her assistants at trial, Ashlea Deener and Samantha Fant, and her assistants on appeal, Joseph W. Spence and Shelby J. White, 401 W. Belknap, Fort Worth, Texas, 76196-0201.

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STATEMENT OF THE CASE

Pursuant to this Court's grant of the State's petition on September 30, 2020, the State appeals from a reversal by the Second Court of Appeals (Fort Worth) of a judgment of conviction by the Criminal District Court No. 1 of Tarrant County, Texas.

Appellant Robert Hallman was convicted by a jury of two counts of aggravated sexual abuse of a child under 14 (Counts 2-3), three counts of indecency of a child by contact (Counts 4-6), and one count of sexual assault of a child under 17 (Count 7). [RR 10:21-24; CR 6-7, 235-40, 279-89]. The jury found Appellant not guilty of Count 1 of the Indictment, alleging continuous sexual abuse of a child under 14. [CR 6-7, 234, 278]. The jury sentenced Appellant to life imprisonment on each of the six counts. [CR 269-75, 278-89].

During the punishment phase of trial, Appellant moved for a mistrial based on a purported violation of Article 39.14. [RR 18:51-53, 61]. Appellant argued that the State failed to timely disclose a family violence packet prepared by police in 2014 regarding an unrelated family violence assault charge against Appellant. [RR 18:61-64]. The trial court denied the motion, finding that a separate offense report from the same 2014 assault, which the State had disclosed to Appellant, contained substantially the same information as the family violence packet. [RR 18:66, 68-69].

The Court of Appeals reversed, holding that a handwritten statement in the

family violence packet was favorable impeachment evidence, and that had the handwritten statement been disclosed, there was a reasonable probability that the trial's outcome might have been different. *Hallman v. State*, 603 S.W.3d 178, 199-200 (Tex. App.—Fort Worth May 7, 2020, pet. granted).

ISSUES PRESENTED

1. Did the Court of Appeals err when it conducted a purely de novo review of the trial court's denial of a motion for mistrial for an alleged *Brady* violation, a ruling which is traditionally reviewed for an abuse of discretion?

2. In concluding that the non-disclosed evidence in this case was material because it "might have tipped the balance and resulted in an acquittal," did the Court of Appeals erroneously diverge from the proper materiality standard, specifically that evidence is material only if there is a reasonable probability that, had it been disclosed, the outcome of the trial would have been different?

3. In light of the entire body of evidence, did the Court of Appeals err in concluding that Appellant's ability to impeach a witness regarding a distant extraneous offense with her own handwritten statement in reasonable probability would have resulted in a different outcome at trial, when that witness was actually impeached on the same issue in a different manner?

STATEMENT OF FACTS

I. Amy and Rita make delayed outcries.

Appellant and his wife Kim[1] divorced in 2016. [RR 11:106]. They have four children together. [RR 11:101-02]. Two of their daughters, Amy and Rita, are the complainants in this case. [CR 6-7]. In March 2016, Rita out-cried to Kim that she had been sexually abused by Appellant. [RR 10:251-52; 11:138-41, 251; 12:131-32]. In 2017, Amy also out-cried that she had been sexually assaulted by Appellant [RR 10:263; 11:141-45, 274; 12:134]. In 2017, Appellant was indicted on varying counts of sexual assault of a child. [CR 6-7]. These sexual assault offenses are the subject matter of this appeal.

II. The offense report of the August 10, 2014, extraneous offense is disclosed prior to trial.

Prior to trial, the State filed a notice of prior bad acts/extraneous offenses that might be used as evidence at trial. [CR 139-43]. One extraneous offense contained in the State's Rule 404(b) notice involved Appellant's 2014 conviction for assault/bodily injury/family violence. [CR 139-140 at ¶ 9]. This assault conviction arose out of an August 10, 2014, incident involving an argument between Appellant and Kim. *Hallman*, 603 S.W.3d at 181-82. Detective Cesar Robles, the responding officer, prepared an offense report for the August 10, 2014, family violence incident.

[1] Because the complainants were minor children at the time of the offenses, the State identifies the parties by the pseudonyms used by the Court of Appeals.

Id. 182. [RR19:State's Ex. 36]. This offense report was produced to Appellant by the State during pretrial discovery. [RR 18:51-53].

III. The family violence packet from the August 10, 2014, extraneous offense is not timely disclosed prior to the guilt/innocence phase of trial.

The contents of the offense report for the August 10, 2014, incident made specific reference to a "Family Violence Packet" and a written statement. [RR 19:State's Ex. 36 at 584, 586]. The family violence packet consists of 13 pages. [RR 19:Defense Ex. 28]. *Hallman*, 603 S.W.3d at 183, 188. Included in the family violence packet was Kim's handwritten statement which contains a single paragraph that deals with the facts surrounding the family violence assault on August 10, 2014. [RR 19:State's Ex. 38]. There is no mention in the handwritten statement that Kim told the responding officers during the August 10, 2014, incident that she suspected Appellant was sexually abusing Amy. [RR 19:State's Ex. 38].

Central to this appeal is the fact that the State did not produce the family violence packet to Appellant until the punishment phase of trial. *Id.* at *1.[2] The Court of Appeals' opinion in this case turns on the existence of this single page from the family violence packet that contains the handwritten statement of Kim regarding the August 10, 2014, incident. *Id.* at **17-18.

[2] Nothing in the record suggests that the State's failure to produce the family violence packet was anything other than an inadvertent accident.

IV. Kim testifies at trial regarding the August 10, 2014, extraneous offense.

The State called Kim during the State's case-in-chief. [RR 11:100]. On direct examination, the State asked Kim about the August 10, 2014, incident. [RR 11:133].[3] Kim's testimony was limited to stating that Appellant was arrested as a result of this incident. [RR 11:133]. On cross-examination, Appellant's counsel asked Kim if she had ever told police officers that she suspected Appellant was sexually abusing Amy. [RR 11:203]. Kim testified that at the time of the August 10, 2014, incident, she told the responding officers that she suspected Appellant was sexually abusing Amy. [RR 11:203]. There is no mention in the handwritten statement that Kim told the responding officers during the August 10, 2014, incident that she suspected Appellant was sexually abusing Amy. [RR 19:State's Ex. 38]. At that point, Kim's handwritten statement to law enforcement regarding the August 10, 2014, incident (which was contained in the family violence packet) had not been disclosed by the State, and, therefore, Appellant was unable to directly impeach Kim with her handwritten statement.

V. Appellant impeaches Kim's testimony by calling one of the responding officers to testify.

The nondisclosure of Kim's handwritten statement did not prevent Appellant from effectively impeaching Kim's testimony that she told the responding officers

[3] Unrelated to the issues on appeal, Appellant called the police due to a fight between Appellant and Kim the day before on August 9, 2014. [RR 11:233-235]. Police came to their home, but no one was arrested. [RR 11:233-235].

on August 10, 2014, that she suspected Appellant was sexually abusing Amy. To impeach Kim's testimony, Appellant called the responding officer, Detective Robles, to testify about the August 10, 2014, incident. [RR 14:203]. Detective Robles, relying on his offense report, testified that Kim never said anything about concerns that her daughter was being sexually abused by Appellant. [RR 14:207]. Detective Robles further testified that another officer, Officer Oakley, was also on the scene, and Officer Oakley similarly had no record that Kim mentioned any concern that Amy was being sexually abused by Appellant. [RR 14:206-07]. Thus, even though Kim's handwritten statement was unavailable to Appellant to impeach Kim's trial testimony, Appellant nonetheless presented to the jury effective impeachment of Kim through Detective Robles' testimony that, on August 10, 2014, Kim never told Detective Robles or Officer Oakley that she suspected Appellant was sexually abusing her children.

VI. The family violence packet is disclosed during the punishment phase of trial.

During the punishment phase of trial, the defense made a specific request for the family violence packet from the August 10, 2014, family violence incident, which the State then disclosed. [RR 18:51-53, 61]. Appellant then requested a mistrial under Article 39.14 on the basis that the State's failure to disclose the family violence packet prior to trial affected his trial strategy. [RR 18:61-64]. In particular, Appellant alleged that he would have impeached Kim's testimony that she reported

her suspicions of sexual abuse through her own handwritten statement, rather than through the Detective Robles' testimony. [RR 18:46-47, 62-63]. The trial court held a hearing to determine the materiality of the family violence packet and whether its untimely disclosure warranted a mistrial. [RR 18:43-69]. The trial court determined that because the contents of the family violence packet, including the gist of Kim's handwritten statement, were included within the narrative of the offense report that was disclosed prior to trial, and because Appellant was able to impeach Kim through the officer's testimony, a mistrial was not warranted. [RR 18:66, 68-69].

SUMMARY OF THE ARGUMENT

At its most basic level, the Fort Worth Court of Appeals' opinion erred in applying the standard of review and substituting its own opinion for that of the trial court. First, Court of Appeals did not afford the appropriate deference to the trial court's ruling on the motion for mistrial. A denial of a motion for mistrial is usually reviewed for an abuse of discretion using the three factors set out in *Mosley v. State*. However, *Brady* violations are reviewed substituting the factor *Bagley* test in place of the *Mosley* test. Under *Bagley*, an appellant must prove that (1) the State failed to disclose evidence, (2) the withheld evidence is favorable to the appellant, and (3) the evidence is material. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). The Court of Appeals erred in applying a de novo standard of review to the materiality factor and ignoring the overarching abuse of discretion standard that applies to a motion for mistrial.

Moreover, the Court of Appeals erred in applying a strictly de novo standard of review to the materiality factor because this Court has held that materiality is a mixed question of law and fact requiring the reviewing court to defer to the trial court's rulings on issues of credibility and demeanor. Because this case involved impeachment evidence, the trial court was in the best position to evaluate Kim's credibility as a witness, and to determine whether the additional impeachment with Kim's handwritten statement was material.

The materiality prong under *Bagley* requires a defendant to establish that there is a reasonable ***probability*** that, had the evidence been disclosed, the outcome of the trial ***would*** have been different. *Diamond v. State*, --S.W.3d--, No. PD-1299-18, 2020 WL 3067582, at *7 (Tex. Crim. App. June 10, 2020). However, in reviewing the evidence for materiality, the Court of Appeals lightened the defendant's burden under *Bagley*, holding that Kim's handwritten statement "*might* have tipped the balance and resulted in an acquittal… ." The materiality prong does not speak in terms of "possibility" or that the outcome "could" have been different. As this Court held in *Hampton*, "The mere possibility than an item of undisclosed information might have helped the defense or might have affected the outcome of trial, does not establish 'materiality" in the constitutional sense." 86 S.W.3d at 612.

Furthermore, the materiality standard requires a court to examine "the alleged error in context of the entire record and the overall strength of the State's case." *Diamond*, 2020 WL 3067582, at *7 (emphasis added). The Court of Appeals viewed the evidence in the light least favorable to the State, discounted the strength of the State's case, (particularly the victims' testimonies) and failed to analyze *why* Kim's handwritten statement would have had an impact on the jury's verdict.

Ultimately, The Court of Appeals' held that low-value impeachment evidence of a non-complaining witness, concerning an extraneous and attenuated offense, is now considered "material" under *Brady* — essentially a strict liability standard.

ARGUMENT AND AUTHORITIES

I. The Court of Appeals applied the wrong standard of review and/or erred in applying the standard of review.

A. The standard of review for a denial of a motion for mistrial is abuse of discretion.

The denial of a motion for mistrial is reviewed for an abuse of discretion, meaning that the reviewing court "must uphold the trial court's ruling if it was within the zone of reasonable disagreement." *Hallman*, 603 S.W.3d at 187; *see also Prince v. State*, 499 S.W.3d 116, 121 (Tex. App.—San Antonio 2016, no pet.) (citing *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007)). Traditionally, a reviewing court analyzes the denial of a motion for mistrial for an abuse of discretion by balancing three factors set out in *Mosley v. State*, 983 S.W.2d 249, 260 (Tex. Crim. App. 1998). *See Hawkins v. State*, 135 S.W.3d 72, 76-77, 85 (Tex. Crim. App. 2004) (applying the *Mosley* factors balancing test under an abuse of discretion standard).

In this case, the Court of Appeals held that "*Brady* violations are treated differently" and substituted the *Mosley* factors that normally govern review of the denial of a motion for mistrial (i.e., severity of misconduct, curative measures, and certainty of conviction) with the three-pronged *Bagley* test used to establish a *Brady* violation. *Hallman*, 603 S.W.3d at 187-88.[4] Per the *Bagley* test, to establish

[4] The State does not dispute the Court of Appeals' substitution of the three *Mosley* factors with the three *Brady* factors in analyzing a potential Article 39.14 violation. Because Article 39.14 (also known as the Michael Morton Act) is the statutory codification of *Brady*, courts have generally

reversible error under *Brady*, an appellant must prove that (1) the State failed to disclose evidence, (2) the withheld evidence is favorable to the appellant, and (3) the evidence is material. *Hampton*, 86 S.W.3d at 612 (applying three-prong *Bagley* test for errors under *Brady*). Evidence is material if there is a reasonable probability that, had it been disclosed, the outcome of the trial would have been different. *Diamond*, 2020 WL 3067582, at *7; *see also Hampton*, 86 S.W.3d at 612. But substitution of the *Mosley* factors with the *Bagley* test does not eliminate the overarching abuse of discretion standard of review for a denial of a motion for mistrial, including the reviewing court's obligation to uphold the trial court's ruling if it was "within the zone of reasonable disagreement."[5]

B. The Court of Appeals ignored the abuse of discretion standard of review for a motion for mistral.

As discussed above, a defendant must establish that (1) the State failed to disclose evidence, (2) the evidence is favorable to the defendant, and (3) the evidence is material. *Hampton*, 86 S.W.3d at 612 (referring to the *Bagley* test). The first two

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applied the three-factor test under *Brady* in determining whether a failure to disclose under Article 39.14(h) warrants a new trial. *See Hallman*, 603 S.W.3d at 188.

[5] *See also Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007) (holding that motion for mistrial is reviewed for an abuse of discretion for an alleged *Brady* violation, and a trial court only abuses its discretion "when no reasonable view of the record could support the trial court's ruling."); *Diamond,* 2020 WL 3067582, at *7 (holding that appellate courts apply abuse of discretion standard to review of habeas judge's rulings on *Brady* claim in Article 11.072 writ); *Branum v. State*, 535 S.W.3d 217, 224 (Tex. App.—Fort Worth 2017, no pet.) (holding that trial court's ruling on pretrial discovery under Article 39.14/*Brady* would be reviewed for abuse of discretion); *Young v. State*, 591 S.W.3d 579, 603 (Tex. App.—Austin 2019) (applying abuse of discretion standard to review of trial court's ruling on motion for new trial based on *Brady* violation).

Bagley prongs were not at issue in this case; as such, the Court of Appeals focused solely on the issue of materiality under the third prong. *Hallman*, 603 S.W.3d at 199. The Court of Appeals conducted only a de novo review of the issue of materiality, and materiality was the sole deciding factor in determining if there was error in granting a mistrial under *Brady*. But the Court of Appeals gave no deference to the trial court's factual and credibility determinations underlying its materiality finding, and the Court of Appeals never applied the overarching abuse of discretion standard of review and the "zone of reasonable disagreement" analysis.

The Court of Appeals' application of the standard of review then begs the question: what deference is due to a trial court in ruling on a motion for mistrial with an underlying *Brady* issue? The State would argue that at least some deference is due to the trial court because the determination of a *Brady* issue is so largely dependent on factual and credibility determinations that the trial court is in the best position to evaluate.[6] But in any case, the test as it stands now lacks clarity in its application when the *Bagley* factors are applied underneath an overarching abuse of discretion standard of review, *i.e*., mistrial, new trial, or habeas review.

C. The Court of Appeals erred in applying a strictly de novo review of the materiality prong of the *Bagley* test.

In its review, the Court of Appeals also erroneously applied a strictly de novo

[6] As discussed below, review of the materiality prong under *Brady* anticipates some degree of deference being given to the trial court's determinations. *See Diamond*, 2020 WL 3067582, at *6.

review of the materiality prong. *See Hallman*, 603 S.W.3d at 192 ("But materiality, a legal question that we review de novo, remains the linchpin of both Article 39.14(a) and *Brady*."). This Court held in *Diamond* that whether evidence is material under *Brady* is a mixed question of law and fact, not solely a question of law. *Diamond*, 2020 WL 3067582, at *6 n.25.

> Whereas we typically analyze legal issues de novo, a *Brady* determination is inevitably a contextual inquiry, involving questions of both law and fact. Moreover, it is intimately intertwined with the trial proceedings: because the court must judge the effect of the evidence on the jury's verdict, the *Brady* decision can never be divorced from the narrative of the trial.

Id. (citing *United States v. Sipe*, 388 F.3d 471, 479 (5th Cir. 2004)).

When reviewing a mixed question of law and fact, the reviewing court should defer to the trial court's ruling on mixed questions of law and fact, if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). De novo review of mixed questions of law and fact is proper only when they do not depend upon credibility and demeanor. *Weinstein*, 421 S.W.3d at 664. Appellate courts must also evaluate the facts "in the light most favorable to the trial court's ruling." *Hampton*, 86 S.W.3d at 611.

In other words, the trial court is afforded deference under the "zone of reasonable disagreement" regarding the factual findings that underlie the *Brady* materiality analysis. *See Young*, 591 S.W.3d at 598 ("We consider the evidence in

the light most favorable to the district court's ruling that the State's failure to disclose the additional information did not violate the defendant's due process rights."); *Webb*, 232 S.W.3d at 115 (affirming appellate court's consideration of the evidence in light most favorable to trial court's determination that evidence was not material and trial court did not err in denying motion for mistrial).

In denying the motion for mistrial, the trial court found that: (1) "the essential information from [Kim and Appellant's handwritten] statements is contained" in the offense report, (2) the evidence pertained to an extraneous offense that defendant was not on trial for in this case, and (3) that the victim of the domestic violence incident, Kim, was not one of the victims in this case. [RR 18:66]. These three key facts let the trial court to ultimately conclude that the evidence was not material. The Court of Appeals acknowledged, "[c]redibility was key to this case." *Hallman*, 603 S.W.3d at 199. However, rather than deferring to the trial court (and the jury's) findings regarding Kim's credibility, the Court of Appeals erred by failing to give deference to the trial court's findings and by viewing the evidence in a light ***least favorable*** to the jury's verdict. *Hallman*, 603 S.W.3d at 187.

As discussed more in depth later in this brief, the materiality of the evidence at issue was dependent on the analysis of Kim's handwritten statement in light of the entire body of evidence admitted at trial. *See supra*, Section II.B. The Court of Appeals looked only at the evidence it believed did not support the verdict, and

considered that evidence separately, not in context with the other evidence that was admitted. *Hallman*, 603 S.W.3d at 199. The Court of Appeals placed a heavy emphasis on Kim's testimony, but barely discussed the testimony of Rita and Amy. *Hallman*, 603 S.W.3d at 195-198. But in fact, as the victims in this case, Amy and Rita were the key witnesses, and both testified extensively about Appellant's sexual abuse. [RR 10:36-194; 12:41-81, 91-109; 14:6-41, 44-135].

In sum, applying a strictly de novo standard of review to the materiality prong under *Bagley* is erroneous because materiality is a mixed question of law and fact, and the trial court's factual determinations are owed deference. Moreover, the reviewing court should consider all the evidence in the light most favorable to the verdict. Here, the Court of Appeals did the opposite, giving no deference to the trial court's findings, lightening Appellant's burden, and reviewing the materiality of the evidence in the light least favorable to the verdict. By giving no deference to the trial court's findings on materiality and by viewing the evidence in the light least favorable to the jury's verdict, the Court of Appeals erred in applying the standard of review. This led to an impermissible result: the Court of Appeals simply substituted its own opinion for that of the trial court's opinion on the issue of materiality.

II. The Court of Appeals impermissibly lightened Appellant's burden to show materiality.

Even if the Court of Appeals was correct in applying a purely de novo review

of the *Bagley* test, and without granting the "zone of reasonable disagreement" deference, its analysis and ultimate holding are flawed.

A. The Court of Appeals incorrectly applied a possibility, rather than a probability, standard to the materiality prong of the *Brady* analysis.

The Court of Appeals reasoned that "a total or substantial discount of Kim's testimony *might* have produced a different result during the guilt-innocence phase of trial." *Hallman*, 603 S.W.3d at 199 (emphasis added). The Court of Appeals also held that the nondisclosed evidence was material because in reasonable probability it "*might* have tipped the balance and resulted in an acquittal… ." *Hallman*, 603 S.W.3d at 199 (emphasis added). This is simply the wrong standard. As both United States Supreme Court and this Court have recognized, "The mere ***possibility*** that an item of undisclosed information ***might*** have helped the defense, or ***might*** have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Hampton*, 86 S.W.3d at 612 (emphasis added); *see U.S. v. Agurs*, 427 U.S. 97, 109-10, 96 S.Ct. 2392 (1976).

"Would" is an auxiliary verb used to "express probability or presumption."[7] "Probable" is defined as "supported by evidence strong enough to establish presumption but not proof."[8] Thus, the term "reasonable probability" contemplates

[7] "Would." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/would (last visited Nov. 12, 2020).
[8] "Probable." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/probable (last visited Nov. 12, 2020).

some degree of strong evidence and certainty, enough to undermine confidence in the outcome of the trial. By contrast, "might" is an auxiliary verb used to "say that something is possible."[9] "Possible" is defined as "being something that may or may not occur."[10] "Possible" does not speak to likelihood or certainty— it is not sufficient to undermine confidence in the outcome of a trial.

As discussed further below, the Court of Appeals ignored the context of the record and the strength of the State's case. *See supra*, Section II.B. Instead, the Court of Appeals erroneously viewed the evidence in the light least favorable to the trial court's decision, and even under this erroneous view, the impeachment value of Kim's handwritten statement was still not enough to establish "reasonable probability." To compound this mistake, the Court of Appeals lightened the appellant's burden to show that the evidence was material, holding that the impeachment evidence "*might* have tipped the balance." *Hallman*, 603 S.W.3d at 199. The materiality prong of the *Brady* test speaks in terms of "reasonable probability," not "possibility," and that the outcome "would" have been different, not that it "might" have been different. Thus, in holding that *Brady* information ***possibly*** or ***might*** have affected the outcome of a trial, the Court of Appeals applied

[9] "Might." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/might (last visited Nov. 12, 2020).
[10] "Possible." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/probable (last visited Nov. 12, 2020).

a lower standard.

B. The Court of Appeals failed to consider the entire body of evidence.

With regard to whether the undisclosed evidence is material, the Court of Appeals erred by failing to look at all the other evidence adduced at trial in the context of the overall strength of the State's case. *Hampton*, 86 S.W.3d at 612. In particular, the Court of Appeals failed to acknowledge that Amy and Rita, not Kim, are the complainants and therefore the principal witnesses. *See Hallman*, 603 S.W.3d at 199 n. 19. The Court of Appeals never questions (much less addresses) (1) the fact that the jury believed Amy's testimony, and (2) other key evidence that supports the conclusion that Amy was telling the truth about Appellant's sexual abuse.

Instead, the Court of Appeals seems to view the other evidence adduced at trial only in the **context of Kim's credibility**. *See Hallman*, 603 S.W.3d at 199. The Court of Appeals describes and utilizes the "other evidence" to support its belief that Kim lacked credibility instead of analyzing the "other evidence" in the context of the entire record and the strength of the State's case and the jury's guilty verdict. Simply put, the Court of Appeals' analysis fails to address the ultimate issue: in the context of viewing all the record evidence, would the undisclosed impeachment evidence in this case have in reasonable probability produced a different result? The answer is a resounding no.

1. The Court of Appeals failed to detail why Kim's handwritten statement was material.

To establish reversible error under *Brady*, a defendant must establish that (1) the State failed to disclose evidence, (2) the evidence is favorable to the defendant, and (3) the evidence is material. *Hampton*, 86 S.W.3d at 612 (referring to the *Bagley* test). Regarding the first two prongs, there is no dispute that the evidence in this case was not disclosed until after the guilt/innocence phase of trial, and that the undisclosed evidence would have been favorable impeachment evidence. Thus, only the third prong of "materiality" is at issue.

However, even though it is undisputed that the evidence is favorable in this case, the second and third prongs under the *Bagley* test are intertwined. "Favorable evidence is that which, if disclosed and used effectively, 'may make a difference between conviction and acquittal.'" *Diamond*, 2020 WL 3067582, at *7. Favorable evidence includes both exculpatory evidence and impeachment evidence. *Id.* Exculpatory evidence justifies, excuses, or clears a defendant from fault. *Id.* Impeachment evidence "disputes, disparages, denies, or contradicts other evidence." *Id.*

But, the nondisclosure of "favorable" evidence only violates due process if it is "material" to guilt or punishment. To establish that evidence is material, the appellant must show a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different. *Diamond*, 2020 WL 3067582, at

*7; *Hampton*, 86 S.W.3d at 612. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Diamond*, 2020 WL 3067582, at *7. Materiality is determined by examining the evidence collectively, in the context of the entire record and the overall strength of the State's case. *Id.*; *see also Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011). Historically, exculpatory evidence has been more likely to be considered material than mere impeachment evidence.[11] Thus, impeachment evidence has a higher burden to clear than that of exculpatory evidence in analyzing the materiality of a piece of favorable evidence.

A key component of the "materiality" analysis is that the reviewing court should analyze an alleged Article 39.14 violation "in light of all other evidence adduced at trial." *Hallman*, 603 S.W.3d at 193. Materiality is determined by "examining the alleged error in context of the entire record ***and the overall strength of the State's case***." *Diamond*, 2020 WL 3067582, at *7 (emphasis added). This is particularly important in the context of analyzing impeachment evidence, because the value of impeachment evidence can vary widely depending on the context of the record and the strength of the State's case.

This Court's opinion in *Hampton v. State* is instructive. In that case, the appellate court had concluded that "had the defense timely known this [*Brady*]

[11] *Compare e.g., Diamond*, 2020 WL 3067582, at *9 (holding that evidence impeaching a DNA analyst was not material) *with Pena*, 353 S.W.3d at 812-13 (exculpatory statement by defendant that substance was hemp, not marijuana, was material).

information, appellant 'might well have chosen a different strategy which could have exonerated him.'" *Hampton*, 86 S.W.3d at 612. However, the appellate court "did not elaborate on how the defensive strategy might have differed or what would be the probable impact of discovering [the *Brady* evidence] at an earlier time." *Id.* This Court reversed, holding that the court of appeals failed to review the *Brady* evidence in light of all the other evidence adduced at trial. *Id.*[12]

In this case, the Court of Appeals similarly assumed the *Brady* impeachment evidence was material without explaining ***why***. *See id.* at 613 ("a reviewing court should explain why a particular *Brady* item is especially material in light of the entire body of evidence"). The Court of Appeals never discusses the fact that the trial court found the information contained in the offense report (which was timely disclosed) was substantially similar to the information in Kim's handwritten statement. And, Detective Robles and his offense report provided the jury with the same impeachment information as Appellant would have used through Kim's witness statement. *See supra*, Section II.B.3.

The Court of Appeals discounts the impeachment that did occur, noting "Detective Robles testified that he had no independent recollection outside of the

[12] *See also Archie*, 221 S.W.3d at 703 (Meyers, J., concurring) ("[T]he court of appeals analyzed the issue backward. Rather than considering the trial court's failure to grant a mistrial and determining whether to do so was an abuse of discretion, the court found error … and then analyzed this to determine whether it was harmful. The court determined that because it may have contributed to the punishment assessed [or in this case the jury's verdict], the comment was harmful.").

offense report, and Kim's handwritten statement directly contradicting her testimony at trial regarding whether she mentioned potential sexual abuse of Amy by Appellant – the central issue at trial – would have provided the jury with stronger evidence of her credibility or lack thereof." *Hallman*, 603 S.W.3d at 199 n. 19. But just because Kim's handwritten statement was "stronger" impeachment evidence does not mean that Detective Robles' impeachment evidence was weak or valueless. On the contrary, Detective Robles testified during cross-examination that the events would never have occurred as Kim described them, because per his officer training, he would not have questioned a child about allegations of sexual abuse. [RR 14:211]. And there is no indication that Detective Robles failed to document an allegation of sexual abuse in his offense report. [RR 14:207-12]. Thus, the impeachment that did occur was not so different from the impeachment that could have occurred through Kim's handwritten statement. *See supra*, Section II.B.3.

The Court also fails to discuss a key component of the potential impeachment – it involves an extraneous offense that happened two years before any outcry, and it does not impeach either victim's testimony. Contrary to the Court of Appeals' assertion, it does not necessarily follow from Kim's impeachment that she must have coached Amy and Rita. The far more plausible explanation for Kim's impeachable testimony is that she was embarrassed, distraught, and upset to reveal at trial that she had never done anything to prevent a series of sexual assaults that in hindsight

seemed obvious. Accordingly, the Court of Appeals' characterization of the impeachment of Kim's testimony that she told Detective Robles that she suspected sexual abuse as "the central issue at trial" is baseless. *Hallman*, 603 S.W.3d at 199 n. 20.

Appellant received the maximum possible sentence on the six individual counts – a life sentence for each one. [CR 269-74]. The fact that the jury sentenced Appellant to the maximum possible sentence contradicts any indication that the jury believed the facts to be in dispute, or that impeachment with Kim's handwritten statement would have influenced the guilt/innocence phase of the trial.

Because the evidence at issue is impeachment evidence, not exculpatory evidence, the standard to prove materiality is higher. The Court of Appeals erred in failing to consider the entirety of the evidence, and context of the entire record in weighing the impeachment value of Kim's handwritten statement.

2. The evidence supporting the State's case was strong.

In addition to viewing the evidence in the light least favorable to the trial court's ruling, the Court of Appeals also failed to account for the strong evidence supporting the State's case in its materiality analysis. *See Hallman*, 603 S.W.3d at 195-198 (discussing the evidence presented at trial). Amy was 18 years old when she testified. [RR 12:41]. She provided detailed and graphic testimony of Appellant's sexual assaults. Appellant first started touching her when she was in

seventh or eighth grade, "playing" with her and Rita by trying to pull their pants down and touch them between the buttocks. [RR 12:60-62]. Appellant's sexual abuse included oral sex, intercourse, digital penetration, and fondling that occurred in her bedroom, the living room, and the computer room of her house. [RR 12:60-64, 70-75, 79, 92-94]. He threatened Amy that if she told anyone, he would go to jail. [RR 12:75]. Amy also testified that at night Appellant would sometimes come into the bedroom she shared with Rita, and she would see his hands moving around under the covers of Rita's bed "almost every night." [RR 12:70-71].

When Amy was around 16, she left home to live with Appellant at a hotel. [RR 12:77-78]. She stayed with him for two to three months, and during that time, Appellant sexually abused her in the hotel room where they were staying. [RR 12:79, 93-94]. In addition, she testified extensively about Appellant's "grooming" activities, including providing her and Rita with money that he did not give to the other children, and trying to keep her and Rita away from Kim. [RR 12:6-60].

Rita was 20 when she testified at trial. [RR 10:37]. She testified that Appellant regularly asked her to rub Vaseline on his feet, but that when she was around 12, Appellant instead asked her to rub Vaseline on his penis. [RR 10:46-48]. She stated that Appellant would regularly demand that she show him private body parts if she wanted something, like permission to spend the night at a friend's house. [RR 10:54-56].

She also testified that Appellant often committed his sexual assaults in the living room, corroborating Amy's testimony. [RR 10:55]. Her testimony regarding the sexual assaults by Appellant also mirrored Amy's testimony of how Appellant would sexually assault her. [RR 10:56-58]. Rita's testimony confirmed Amy's testimony that Appellant would come into their bedroom at night and sexually assault Rita by putting his hands in her pants and touching her sexually. [RR 10:59]. Thus, Rita and Amy's testimony dovetailed in many significant ways, lending credibility to their testimony.

While the jury ultimately did not find Appellant guilty of continuous sexual assault against Rita, her testimony was still an important part of the trial evidence. The jury found Appellant guilty on six counts of specific instances of sexual abuse against Amy. [CR 235-40].[13] However, the jury acquitted Appellant of continuous sexual abuse, which was the only count that alleged any act of sexual abuse against Rita. [CR 234]. The Court of Appeals held that impeachment of Kim's testimony would have had a greater effect on the outcome of the trial because the jury had already found Rita's testimony to be not credible. The Court of Appeals reasoned that because the jury acquitted Appellant of continuous sexual abuse, the jury did not find Rita to be a credible witness. *Hallman*, 603 S.W.3d at 199 n. 18.

[13] Notably, Appellant received the maximum life sentence on each of the six individual instances, refuting any concerns that the jury believed the facts to be in dispute. [CR 269-74].

The Court of Appeals' holding discounts the nature of a continuous offense and creates a false equivalence. Continuous sexual abuse requires a jury to find that specific instances of abuse occurred during a period of time of 30 days or more – it does not necessarily follow from a failure to find for continuous sexual abuse that the jury did not believe Rita regarding any individual predicate offense, or that the jury did not find any of her testimony to be credible. [*See* CR 244, 248 (asking for clarification of continuous offense)]. Because the indictment did not allege specific predicate offenses by Appellant against Rita, it cannot be assumed that the jury did not find Rita's testimony regarding those specific offenses to be credible or that the jury did not find Rita's testimony bolstered Amy's credibility. [CR 6]. *See Mohler v. State*, No. 02-15-00024-CR, 2016 WL 544066, at *2 (Tex. App.—Fort Worth Sept. 29, 2016, pet. ref'd) (mem. op., not designated for publication) (recognizing that a finding of not guilty as to continuous does not preclude a guilty finding as to individual offenses). Thus, in analyzing the totality of the evidence at trial, Rita's testimony cannot be discounted or ignored, especially to the extent that it supports and lends credibility to Amy's testimony.

Kim testified about Appellant's grossly inappropriate behavior of buying both Rita and Amy lingerie (at a time when Amy was 12 years old and Rita was 14 or 15 years old). [RR 11:115-16]. She testified that Appellant would have Amy come outside and sit in his truck with him at 1:00 or 2:00 a.m. on school nights, and that

Amy would get in the truck wearing just a robe. [RR 11:117]. Kim also testified that when Appellant and Amy would spend the night at Appellant's sister's house, Amy would sleep in the same bed with Appellant. [RR 11:118]. Kim also testified that Appellant turned the girls against her and made disparaging comments about her to the girls, and took Amy out of school to go live with him. [RR 11:116-122, 134-38, 192-94]. Perhaps most damningly, she testified that she confronted Appellant about an incident where he had "mistakenly" asked Rita to rub lotion on his penis. [RR 11:123-126]. This corroborated Rita's testimony that she had told her brother about the same such incident, and he had told Kim. [RR 10:50].

Moreover, the Court of Appeals discusses, but gives no weight to the evidence at trial disputing Appellant's theory that Kim "coached" Rita and Amy. *See Hallman*, 603 S.W.3d at 197-98. Sandra Torrence was a qualified forensic interviewer with Alliance for Children who interviewed Rita in 2016 and Amy a year later, in 2017. [RR 12:128, 133]. The Court of Appeals emphasized that on cross-examination, Torrence admitted that if a parent had been educated in sexual abuse signs, the parent might be able to better hide the signs of coaching. [RR 12:158-59]. *See Hallman*, 603 S.W.3d at 198. However, Torrence stated that if a child told a consistent story and was able to correct her, she would not have coaching concerns, even if a parent had been educated in sexual abuse and grooming. [RR 12:159]. Torrence stated definitively that she had no concerns whatsoever that Amy

or Rita were "coached." [RR 12:133-34].[14] Torrence also testified that it was common for children to delay disclosing sexual abuse, and that they might "test the waters" by making a partial disclosure to see how a parent would react. [RR 12:137].[15]

Similarly, Teresa Fugate, a sexual assault nurse examiner ("SANE") at Cook Children's Medical Center conducted a sexual assault exam on Amy. [RR 11:273]. Fugate's report/testimony revealed that Amy told her virtually identical facts that matched Amy's trial testimony, including the nature of the sexual assaults and the locations in the home and a motel where they occurred. [RR 11:273-78].

The defendant must "show[ ] that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995). Because the evidence in this case so strongly supported the verdict, it is unlikely that Kim's potential impeachment would have put the ***whole case*** in an entirely different light. *See Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) ("a verdict which

[14] The Court of Appeals also found that Appellant's lack of access to the handwritten statement at trial limited his ability to develop his theory that Kim had coached Amy and Rita to lie on the stand. *Hallman*, 603 S.W.3d at 199. But, Kim's handwritten statement has no direct link to any evidence of coaching. Rather, the defense would have simply been able to further discredit Kim's testimony regarding the domestic assault incident beyond the impeachment through Detective Robles.

[15] For instance, Rita partially disclosed Appellant's sexual abuse to her older brother, who later told Kim. [RR 10:50]. However, Kim testified that she "took it with a grain of salt" and did not actually believe that Appellant had intentionally sexually abused Rita. [RR 11:123-126]

is only weakly supported by the record is more likely to be affected by [*Brady*] error than a verdict which is strongly supported").

3. Comparing the impeachment of Kim that might have occurred with the impeachment that actually occurred forecloses any conclusion that, had the evidence been disclosed, the jury, in reasonable probability, would have voted to acquit.

Even to the extent that Kim's testimony could have been "better" impeached through her handwritten statement, her overall value as a witness is comparatively low.[16] This was not a case where the complainants were too young or unavailable to testify. Rather, both Rita and Amy testified before the jury extensively regarding the sexual abuse. [RR 10:36-203; 12:41-109; 14:6-134]. *See infra*, Section II.B.2. At trial, Kim testified that she told the responding officers at the time of the August 10, 2014, incident that she suspected Appellant was sexually abusing Amy. [RR 11:201-05]. It is this single testimonial statement, and Appellant's inability to impeach this testimony with Kim's handwritten statement, upon which the Court of Appeals bases its reversal. This begs the question: If Kim's handwritten statement had been disclosed and Appellant had been able to impeach Kim with it, would there, in reasonable probability, have been a different outcome? In making this determination, it is necessary to weigh and compare what might have been (i.e., direct impeachment

[16] *Compare Diamond*, 2020 WL 3067582, at *9 (holding that evidence impeaching a DNA analyst was not material) *with Ex parte Richardson*, 70 S.w.3d 865, 872-73 (Tex. Crim. App. 2002) (holding that impeachment of sole eyewitness to murder by testimony of six police officers was material).

of Kim using her handwritten statement) with the impeachment of Kim that did in fact occur.[17]

To the extent there is a gap between (1) the effectiveness of impeaching Kim with her own handwritten statement about the August 10, 2014, incident, and (2) the effectiveness of Appellant's impeachment of Kim's testimony through Detective Robles, that gap is *de minimis*. And, in light of the evidence of guilt, that gap is certainly not significant enough for the Court of Appeals to conclude that had Kim's handwritten statement been disclosed that it would have, in reasonable probability, resulted in the jury acquitting Appellant.

But the real problem with the Court of Appeals' analysis is that it discounts the value of the impeachment that actually did occur. *See Hallman*, 603 S.W.3d at 198-99 n. 20 (discounting impeachment through Detective Robles because he had no recollection outside his offense report). As this Court held in *Wyatt v. State*, the materiality of undisclosed evidence is significantly diminished when the same

[17] There is a reasonable argument to be made that impeaching a witness with that witness's own handwritten statement is more effective than other methods of impeachment. However, one could also make the counter-argument (based on the record herein) that calling a police officer to the stand to directly refute Kim's testimony is equally, if not more, powerful and effective impeachment. Of course, how the direct impeachment of Kim with her own handwritten statement would have played out is theoretical. But one can easily imagine Kim's response to being confronted with her handwritten statement to be, "I did not write down my suspicions about sexual assault because the officer wanted me to write a statement about the August 10, 2014, assault that had just occurred." This theory is actually supported by the witness statement form which states that the witness's statements "are and will be the same statements I would make during the presentation ***of this case*** in a court of law." [RR 19:State's Ex. 38 (emphasis added)].

impeachment can be accomplished through other means. 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) (evidence was not material because witness's testimony was substantially the same as the undisclosed evidence and therefore defense was able to cross examine the witness on the same subject matter); *see also Saldivar v. State*, 908 S.W.2d 475, 486 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (holding that while defendant could have offered witness's theft conviction, if disclosed, to impeach her credibility with jurors, witness's inconsistent statements permitted defendant "to accomplish the same goal on cross-examination"); *Webb*, 232 S.W.3d at 114-15 (failure to disclose that complainant planned to file civil suit was not material because appellant had other impeaching evidence available). When a defendant can establish impeachment through other means, it becomes more difficult to show that the defendant was actually prejudiced by the State's late disclosure. And, the materiality analysis requires that the defendant be prejudiced. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006) ("Incorporated into the third prong, materiality, is a requirement that defendant must be prejudiced by the state's failure to disclose the favorable evidence."). In this case, Appellant cannot sufficiently establish prejudice because Kim was in fact successfully impeached *on the same issue* raised by her handwritten statement through Detective Robles' testimony.

The Court of Appeals' analysis presumes that had the jury heard a

hypothetical impeachment through Kim's handwritten statement in place of, or in addition to, the actual impeachment through Detective Robles, there was a possibility that the outcome of the guilt/innocence phase of trial might have been different. *Hallman*, 603 SW.3d at 199. This conclusion is not supportable simply because there is so little difference between the two impeachments. The difference between the two impeachments is not one "sufficient to undermine confidence in the outcome of the trial," and the Court of Appeals provides no justification for why it would be. *Ex parte Chaney*, 563 S.W.3d 239, 266 (Tex. Crim. App. 2018); *see also Ex parte Lalonde*, 570 S.W.3d 716, 723 (Tex. Crim. App. 2019); *Harm*, 183 S.W.3d at 409.

The nondisclosure of Kim's handwritten statement does not support a conclusion that the undisclosed evidence would have, in reasonable probability, resulted in a different outcome, and that the non-disclosure in this case must have had a substantial and injurious effect or influence in determining the jury's verdict.

CONCLUSION AND PRAYER

The Fort Worth Court of Appeals has diverged significantly from the accepted standards in analyzing an alleged *Brady* violation, and its decision in this case conflicts with established precedent from this Court and the United States Supreme Court. The State prays that this Court reverse the judgment of the Court of Appeals, and render judgment affirming the trial court's denial of Appellant's motion for

mistrial.

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